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No. 92-1656

IN THE

SUPREME COURT OF THE

UNITED STATES

October 1993 Term

RALPH E. FACEMIRE

Petitioner,

v.

LIBERTY SAVINGS BANK

Respondent,

v.

BEN J. POWERS CONSTRUCTION, INC.

BEN J. POWERS and HAZEL POWERS

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On January 25, 1990, Liberty Savings Bank filed a bill of Complaint against Ben J. Powers Construction, Inc., and Ben J. and Hazel Powers, individually, seeking documents of Title in conformance with requirements under a commercial loan. Ralph E. Facemire was brought in by cross-bill as a third-party defendant having possession of the title documents. The ownership of the equipment was disputed and on October 23, 1991, that issue was tried and found in favor of the Construction Company. The Final Decree relative to the ownership issue was entered November 5, 1991 (Pet. Supp. App. 11). The trial on all accounting issues was held on April 9, 1992, and a Final Decree of Accounting was entered April 14, 1992 (Pet. Supp. App. 8). The hearing on

sanctions was conducted on September 21, 1992, and a Final Decree awarding sanctions against Ralph E. Facemire was entered December 14, 1992 (Pet. Supp. App. 2). Mr. Facemire appealed these decisions to the Supreme Court of Virginia, which petition for appeal was denied on March 15, 1993 (Pet. App. 22). This Petition for Writ of Certiorari followed.

QUESTIONS PRESENTED

Respondents disagree with the assignments of error and questions presented by the Petitioner in his Petition for Writ of Certiorari. The Petitioner has failed to preserve for appeal his objections to the errors now sought to be assigned.

STATEMENT OF FACTS

On November 20, 1989, Petitioner Ralph E. Facemire ("Facemire") consummated the sale of sixteen (16) pieces of heavy construction equipment and his thirty percent (30%) interest in Ben J. Powers Construction, Inc., to the company ("Powers Construction").

The consideration paid to Facemire was $300,000.00 less the pay off balances on the equipment. Facemire received $83,038.47 in cash on November 20, 1989, and he executed the relinquishment letter bearing the same date concerning his thirty percent (30%) interest in Powers Construction.

The transaction was in writing made in Facemire's own hand. The offer was first made to Larry Cameron, an employee of Powers Construction. Mr. Cameron obtained a loan commitment from Liberty Savings Bank ("LSB") but for

reasons of economic concern did not complete the purchase. LSB had required Powers Construction to guarantee the loan and, naturally, Powers Construction sought to purchase the equipment in Mr. Cameron's stead. Mr. Cameron discussed this with Facemire and Facemire agreed to the sale. Thereafter, Facemire had numerous contacts with LSB providing pay off information and inquiring about the funds due him.

Unfortunately, the bank nor Powers obtained an assignment of title or Power of Attorney from Facemire relating to the titles to the equipment which had been pledged as collateral for the loan. Although Facemire's written offer stated "List of items I own which the $300,000.00 buys" and proceeded to enumerate the sixteen (16) pieces of construction equipment, Facemire, nevertheless, took the position that he had not sold any equipment once the

titles and notes marked "paid" began to appear at his residence in December of 1989.

Facemire admitted he drafted the offer and admitted that he signed the relinquishment letter of November 20, 1989, but continued to assert both an ownership interest in the equipment and ownership interest in the company.

On or about January 25, 1990, LSB initiated a specific performance suit against both Powers Construction and Ben J. and Hazel Powers ("Powers") individually, seeking production of the titles to the equipment in conformance with the loan documents so that LSB could perfect its lien. Facemire maintained the equipment was his. Powers and Powers Construction filed a third-party claim against Facemire seeking specific performance of the contract and production of the titles. Various cross-claims were filed by the

parties. Facemire's claim focused on allegations of fraud and conspiracy by LSB and Powers Construction.

The Honorable William Shore Robertson of the Fauquier County Circuit Court requested the Supreme Court of Virginia to designate another judge to hear the case on an expedited basis. The Honorable Arthur Sinclair was so designated. Facemire brought on nine (9) frivolous motions to be heard which were denied by Judge Sinclair. Thereafter, Facemire began making slanderous allegations about an attorney who was neither a party nor counsel in the case. Judge Sinclair rightfully disclosed that he and the attorney were former neighbors. Facemire then moved for Judge Sinclair to recuse himself. Judge Sinclair politely asked Mr. Facemire to reduce his motion to writing for the record. Subsequently, Judge Sinclair did recuse himself and the

Honorable J. Michael Gamble was designated to preside over the case.

Upon motion of the parties Judge Gamble conducted a pre-trial conference wherein the case was divided into ownership issues, accounting issues, and LSB's fraud and intentional interference counts.

On October 23, 1991, trial was conducted on the ownership issues. All parties presented evidence, witnesses and had the opportunity to cross-examine witnesses. After eight hours of testimony and evidence, Judge Gamble ruled that the equipment belonged to Powers Construction. Judge Gamble severed the remaining issues and entered the Final Decree as to ownership on November 5, 1991 (Pet. Supp. App. 11). Facemire did not note an appeal from this decree.

On April 9, 1992, trial was conducted on the accounting issues.

Both Facemire and Powers Construction filed Motions for Summary Judgment which were argued this same date. After considering the arguments made and the authorities presented, the Court granted Powers Construction's Motion for Summary Judgment. The Final Decree of Accounting was entered April 14, 1992 (Pet. Supp. App. 8). No transcript was made of the proceedings.

Facemire filed his Notice of Appeal of the accounting decree presumably timely, although there was no certificate indicating the date filed. Facemire failed to file any transcripts or a statement of facts in support of his appeal.

On September 21, 1992, trial was conducted on Powers' and Powers Construction's Motion for Sanctions. The Honorable Michael J. Gamble found that Facemire's actions subsequent to the specific performance case were in

many respects undertaken in bad faith with the intent to harass and obstruct, and, accordingly, sanctioned Mr. Facemire (Pet. Supp. App. 2).

Mr. Facemire petitioned the Supreme Court of Virginia to grant an appeal which was denied by the Supreme Court of Virginia on March 15, 1993 (Pet. App. 22).

ARGUMENT AND AUTHORITIES

1. PETITIONER'S ASSIGNMENTS OF ERROR WERE NOT PRESERVED FOR APPEAL

There is no transcript, writing, pleading or documentary evidence that in any manner preserves for appellate review the errors Petitioner now seeks to assign.

Secondly, Mr. Facemire has failed to provide any colorable basis in fact or law to support his allegations of

denial of due process or equal protection.

In order for the United States Supreme Court to review by certiorari the judgment of the state court on the ground that a federal right or privilege is involved, the record must reflect that the right or privilege complained of was raised in the state courts and passed on. Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 33 S. Ct. 510, 57 L.Ed. 857 (1913); Rule 10, Rules of United States Supreme Court; Michie's Jurisprudence, Vol. 1B, Appeal and Error, Section 384.

No such showing can be made by Mr. Facemire on the record.

2. THE JUDGMENTS OF THE TRIAL AND APPELLATE COURTS WERE BASED ON NON-FEDERAL GROUNDS

The United States Supreme Court may exercise its discretion to grant a writ of certiorari to a state supreme court when it appears from the record that the state court of last resort has decided a federal question in a manner which conflicts with the decision of another state court or when a state court of last resort decides an important federal question which ought to be decided by the United States Supreme Court. Neither justification for exercising jurisdiction is implicated here. When a judgment of a state court is based upon a non-federal ground adequate to support it the writ should not be granted. Smith v. Smith, 366 U.S. 210, 81 S.Ct. 1050, 6 L.Ed. 2d 233 (1961).

3. PETITIONER WAS AFFORDED DUE PROCESS OF LAW

Mr. Facemire was provided notice of the proceedings; a neutral decision-maker; an opportunity to make oral presentation to the decision-maker; an opportunity to present evidence and witnesses; an opportunity to confront and cross-examine witnesses and evidence; the right to have an attorney present; the right to compulsory process of witnesses; the right to pre-trial discovery; a public hearing; the opportunity to obtain a transcript of the proceedings; and, a decision based upon the record with a statement of the reasons therefore. Nowak, Rotunda & Young, Constitutional Law, 3rd Ed. (1986).

Despite Mr. Facemire's preoccupation with the theories of conspiracy, the record amply supports Mr. Facemire's participation in the

proceeding below and the fair and unbiased determinations made therein.

4. PETITIONER'S ALLEGED VIOLATION OF EQUAL PROTECTION IS WITHOUT SUBSTANCE

Mr. Facemire has failed to provide any support whatsoever in the record for the contention that the commonwealth attorney, Sheriff, State Police, Governor Wilder, and the FBI have violated his rights to equal protection under the laws.

5. THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS NOT APPLICABLE TO NON-CRIMINAL STATE TRIALS

The Seventh Amendment does not require a jury trial in all state court trials under the Fourteenth Amendment to the United States Constitution. Minneapolis and St. Louis R.R. Co. v.

Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916).

Consequently, absent a federal forum, the states are free to determine whether and under what circumstances a jury may be required in civil litigation.

CONCLUSION

There is ample evidence in the record to support the decisions of the trial and appellate courts. There is no evidence in the record to support the assignments of error and questions presented.

Accordingly, Petitioner's Petition for Writ of Certiorari should be denied.

There are no parent or subsidiary companies which should be disclosed.

Respectfully Submitted:

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